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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 117

PHILIP BART,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Summary Statement of Matter Involved	2
Statutes, Resolutions and Rules Involved	4
Questions Presented	7
Argument:	
Point I	8
Point II	9
Point III	13
Point IV	14
Point V	16
Point VI	17
Point VII	17
Conclusion	18

Table of Cases

Brownfield v. *South Carolina*, 189 U.S. 426	12
Carter v. *Texas*, 177 U.S. 442	12
Crawley v. *United States*, 194 U.S. 461	9
Dennis v. *United States*, 339 U.S. 162	7, 9, 10
Emspak v. *United States*, No. 9	9, 13
Frazier v. *United States*, 335 U.S. 497, 510 N. 19	12
Glasser v. *United States*, 315 U.S. 60, 87	12
Morford v. *United States*, 339 U.S. 258	12
Smith v. *Mississippi*, 162 U.S. 592	12
Tarrance v. *Florida*, 188 U.S. 519	12
U. S. ex rel. McMann v. *Thompson*, 144 F. 2d 604	9
U. S. v. *Aaron Burr*, 25 Fed. Cases No. 14692e	9
Quinn v. *United States*, No. 8	13, 17

Statutes and Authorities

Executive Order No. 9835	12
Federal Rules of Criminal Procedure:	
Rule 6	6
Rule 6 (a)	9
Rule 12	6, 9

	Page
House Resolution 5, 79th Cong. 1st Sess.	5
Rule 33, S. Ct.	18
Title 2, U. S. C. Sec. 192	3, 7, 8, 14
2 U. S. C. Sec. 103 as Amended Jan. 27, 1938 C 594	4
5 U. S. C. A. Sec. 631	12
18 U. S. C. A. 5542	9
28 U. S. C. Sec. 1254	2
91 Cong. Rec. 10, 15 (January 3, 1945)	5
95 Fed. Supp. 1010, 1012	2

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BRIEF FOR PETITIONER

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Philip Bart, the petitioner herein respectfully prays that this Honorable Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on the 19th day of December, 1952 (R. 190), affirming the petitioner's conviction in the United States District Court for the District of Columbia.

Opinions Below

The opinion of the Court of Appeals appears at p. 190 of the Record. The opinions of Judge Kirkland denying certain pre-trial motions made by the petitioner and 15 other individuals who were indicted for contempt of Congress appear at 95 F. Supp. 1040 and 1042. The verdict and sentence of Judge Matthews rendered at the conclusion of the trial appear at pp. 182 and 183 of the Record. The trial Court's opinion convicting the petitioner appears at R. 103.

Jurisdiction

The judgment of the Court of Appeals was entered on December 19, 1952. A petition for rehearing was denied on April 15, 1953 with Judge Bazelon dissenting. The jurisdiction of this Court is evoked under 28 U. S. C. Section 1254.

Summary Statement of Matter Involved

The petitioner, Philip Bart, was general manager of Freedom of the Press Co., Inc. On June 21, 1950, he appeared before the House of Representatives Committee on Un-American Activities, hereinafter called Committee; the Committee members on that date included; John S. Wood, Chairman, Francis E. Walter, Burr P. Harrison, John McSweeney, Morgan M. Moulder, Richard Nixon, Francis Case, and Harold Velde (R. 7).

During the course of the hearings the appellant was asked approximately one hundred questions which dealt with his alleged Communist activities, background and associates (R. 8-26).

Of these questions, some thirty-two, the government charges in the indictment containing 32 counts, the appellant wilfully refused to answer. In answer to these questions, the appellant insists that he answered the questions

or claimed his privilege against self incrimination as will hereinafter more clearly appear (R. 108-113).

The appellant together with 15 others was indicted for a violation of Sec. 192 of Title 2, U. S. C., by a grand jury impanelled on October 3, 1950.[1]

On December 17, 1950, the appellant in conjunction with the other defendants aforementioned filed a motion to dismiss the indictment and among contentions argued that the indictment violated the privilege against self-incrimination contained in the Fifth Amendment, and that the indictment was void on the ground that there were less than twelve members of the Grand Jury which voted for the indictment and were biased. The motion was accompanied by a series of affidavits which applied to all these cases in so far as preliminary motions were concerned (R. 121-124).

The United States District Court on January 19, 1951 granted government's motion to strike the affidavits and exhibits upon the ground that they were not appropriate to be considered in connection with pretrial motions. It also appears that the Court on its own motion struck as legally incompetent the appellant's supplementary affidavit on the qualification of the grand jurors (R. 127, 95 Fed. Supp. 1010). The appellant made an offer of proof of actual bias on the part of the grand jurors in support of the allegations thereof. This offer was denied by the Court on January 26, 1951. On January 31, 1951 the Court ruled that under the cases the sentence must be limited to a "maximum penalty for one contempt" (R. 165, 95 Fed. Supp. 1012).

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[1] Julius Emspak, Thomas J. Fitzpatrick, Thomas Quinn, James J. Matles, Frank Panzino, Talmadge Raley, Pasquale L. Z. Branca, Clarence Hiskey, Esther Tice, Frank Hashmall, Louise Berman, Steve Nelson, Giovanni Lomamtz, Marcel Scherer, David J. Bohm. In addition Earl Russell Browder was indicted at about the same time for failure to answer questions before a subcommittee on Foreign Relations of the United States Senate.

On May 3, 1951 the appellant was tried by the Court without a jury as stipulated and approved by the Court, before Judge Burnita S. Matthews (R. 2). Although the indictment contained 32 counts, the government at the conclusion of its case, abandoned 24 counts thereof and the Court found the appellant guilty as charged upon the first 8 counts (R. 28) and thereafter on June 1, 1951 was sentenced to imprisonment for 3 months and a fine of $500.00 and the appellant committed. Thereafter, on the same day a notice of appeal was filed and on June 3, 1951 the Court of Appeals granted bail pending appeal in the amount of $2,000.00.

Thereafter, to wit, on December 19, 1952, the United States Court of Appeals affirmed the petitioner's conviction with Judge Bazelon vigorously dissenting (R. 190-206). On February 24, 1953 a petition for re-hearing was filed (R. 207) and denied on April 15, 1953 with Judge Bazelon again dissenting (R. 210). A petition for certiorari was filed on May 25, 1953 and granted on June 7, 1954.

Statutes, Resolutions and Rules Involved

1. 2 U. S. C. Sec. 192; R. S. Sec. 103 as amended June 27, 1938, c. 594, 52 Stat. 942.

> Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. 2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

> Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.
>
> That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:
>
> '40b. On Un-American Activities, to consist of nine members.'
>
> Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:
>
> '40b. To Un-American Activities—to the Committee on Un-American Activities.
>
> '40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> 'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> 'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signa-

ture of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

3. 3. Rules of Criminal Procedure:

Rule 6. The Grand Jury.

(b) Objections to Grand Jury and to Grand Jurors.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the Court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the Court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the Court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the Court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the Court with or without a jury or on affidavits or in such other manner as the Court may direct.

Questions Presented

1. Whether a witness before a Congressional Committee must be specifically directed to answer by the Committee before he can be held to violate Title 2 of Section 192, U. S. C.

2. Whether the ruling of the Court of Appeals in affirming the denial of the petitioner's request for a hearing on his motion challenging the validity of the Grand Jury is in conflict wtih the Decision of this Court in *Dennis* v. *United States*, 339 U. S. 162, when of the twenty members of the indicting Grand Jury, ten were government employees and in addition, two were wives of government employees, especially in light of the detailed offer of proof and affidavits showing the existence of a climate of opinion among government employees that their tenure would be jeopardized or that they would provoke an investigation by failing to indict the petitioner as requested by the government.

3. Whether there is sufficient evidence in the record to establish the petitioner's guilt beyond a reasonable doubt.

4. Although the Court below rejected the petitioner's contention that he must be specifically directed to answer before being held in violation of Title 2 Sec. 192, U. S. C., the Court apparently held that he must be apprised in some

fashion by the Committee that it intends that he should answer despite his objections, thus establishing the deliberate and intentional character of his refusal as an element of the offense, raising the allied questions whether on the record herein, the petitioner was clearly apprised that the Committee intended that he should answer despite his objections, and afforded an opportunity to answer and whether the case should have been reversed and remanded so that the trier of fact might apply this principle, it first having been raised on appeal.

5. Whether the First Amendment protects a witness before a Congressional Committee against disclosure of the identity of newspaper officials and employees with whom he is associated and his political views and affiliations.

6. Whether the First Amendment protects a witness before a Congressional Committee against compulsory disclosure of the identity of political associates, their political views and affiliations.

7. Whether House Resolution 5 as construed and applied herein abridged the petitioner's freedom of speech, press, and assembly in violation of the First Amendment.

Argument

Point I

A witness before a Congressional Committee must be specifically directed to answer by the Committee before he can be held in violation of Title 2 Sec. 192, U. S. C.

The record in this case fails to disclose a single instance where the Committee specifically directed the witness to answer. In fact, in each instance, there developed a colloquy between the Committee and the petitioner on the one hand and the petitioner's counsel on the other, and at its conclusion the inquiring authority abandoned the particular question and proceeded with the examination. At no time

was there a direction. There was then, no way for the petitioner to know that his responses or the colloquies of the counsel and the Committee were considered refusals. It follows then, as a matter of common sense as well as law, it would be the refusal to such a direction supplying wilfulness or intention as would constitute the contempt. This has been the universal practice since the case of *U. S.* v. *Aaron Burr*, 25 Fed. Cases No. 14692e. It is respectfully contended that if this Court approves a rejection of this procedure by legislative fiat, it not only abdicates its judicial function to a non-judicial body, but condones a subtraction of the protection guaranteed by the Fifth Amendment.

As this issue is also concurrently before this Court in *Emspak* v. *U. S.* No. 9, all the reasons urged upon this Court in that brief are adopted and incorporated herein by the courtesy of counsel.

Point II

The ruling of the Court of Appeals affirming the denial of the petitioner's request for hearing on his motion challenging the validity of the Grand Jury is in conflict with the decision of this Court in *Dennis* v. *U .S.*, 339 U. S. 162.

The government concedes that of twenty members of the Grand Jury voting for an indictment of the appellant, ten of these Grand Jurors were government employees and that two of the members thereof were the wives of government employees. Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, the appellant moved for a hearing on his motion to dismiss the indictment because of the invalidity of the Grand Jury. *Crawley* v. *U. S.*, 194 U. S. 461; *U. S. ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 18 U. S. C. A. 5542; Rule 6 (a) Federal Rules of Criminal Procedure. The Court below summarily denied this request and the

appellant's proffer of proof in support of the motion (R. 163).

This, it is urged, constitutes reversible error as this situation is governed by the direct authority of *Dennis* v. *U. S.*, 339 U. S. 162. The majority of the Court clearly established the conditions precedent to bar government employees from jury service, solely in connection with their employment. Moreover, the Court emphasized the fact that their bias must appear from the record and was not the subject of judicial notice. Mr. Justice Reed in a concurring opinion pointed out that by his view of the majority opinion, government employees might be barred for implied bias when circumstances were properly brought to the Court's attention and convincing the Court that they would not be suitable in a given case, otherwise they would not be subject to disqualification merely because of their employment.

As to the precise type of evidence of bias the majority states as follows:

> "As far as it appears, the Court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future, of a vote of acquittal, but no such proof was made. Nor was there any evidence of a climate of opinion among government employees that would jeopardize their tenure or provoke investigation by such verdict."

The appellant's proffer of proof was directed and intended to satisfy the very requirements created in the *Dennis* case. Two affidavits were submitted in support thereof and subsequently incorporated in the proffer of proof at the time of the application for a hearing.

In this connection, it should be again noted that this application applied to all the cases of contempt then pending before the District Court by reason of indictments rendered by this particular grand jury and the motions were heard

on a consolidation by stipulation and with the consent of the Court. Hence, any documents or exhibits filed by any other defendants would necessarily apply to the instant proceeding, and appellant incorporates by reference the materials submitted in *Julius Emspak* v. *U. S.* (R. 121-159).

Included together with the affidavits of the appellant, there were a number of exhibits and statements of experts tending to show that:

1. Because of the general atmosphere of intimidation government employees have a "low morale" due to the fear that they will be called to account for any activity or expression of opinion indicating the slightest sympathy with any person charged with being a Communist.

2. Government employees as a result of this atmosphere are frightened, "upset and scared."

3. All government employees know the type of investigations made in loyalty cases and therefore assume that any type of activity or expression of opinion which expresses sympathy for ideas or individuals charged with being Communists provides grounds for suspicion of their own "loyalty".

4. The loyalty program is and has been used unjustly and upon the slightest provocation as a means for depriving government employees of their jobs.

5. The Federal Bureau of Investigation investigates every detail of the private lives, opinions, activities, and thoughts of an individual involved in a government employee loyalty check. The F. B. I. uses every technique including wire tapping and anonymous informants.

6. As a result of these facts, prominent observers of the Washington scene have concluded that "suspicion and uncertainty" becloud government service today.

These allegations of fact clearly describe the climate of opinion among government employees and with certainty and precision meet the requirements of bias laid down in

the *Dennis* case as such as would bar them from service and upon such a showing would invalidate the indictment. The Court's rejection of the appellant's proffer of proof and refusal to hear the evidence is, therefore, reversible error. *Carter* v. *Texas*, 177 U. S. 442; *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*, 188 U. S. 519; *Glasser* v. *U. S.*, 315 U. S. 60, 87; *Morford* v. *U. S.*, 339 U. S. 258.

The rejection of a proffer of proof made in open Court in support of a motion to dismiss an indictment for improper constitution is likewise reversible error. *Carter* v. *Texas*, *supra*; *Brownfield* v. *South Carolina*, 189 U. S. 426; compare *Glasser* v. *U. S.*, *supra*.

Morford v. *U. S.*, 339 U. S. 258, is directly in point. In that case, the Supreme Court in a per curiam opinion held that a refusal of the trial Court to permit examination as to "the possible influence of the 'loyalty order', Executive Order No. 9835, 5 U. S. C. A. Sect. 631 vote on their (jurors) ability to render a just and impartial verdict. At page 259 of its opinion reversing the judgment, the Court said:

> "We said in Dennis that preservation of opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury. Id., 339 U. S. 171-172, 70 S. Ct. 523. Since that opportunity was denied in this case, the petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed."[2]

---

[2] "Actual bias" as used in these cases involving government employees includes bias inferred from particular circumstances of the case. See *Frazier* v. *U. S.*, 335 U. S. 497, 510 N. 19.

> "The phrase 'actual bias' is used in this opinion as it was in the Wood Case. * * * As it appears from the portion of the opinion quoted in the text infra note 23 the Court regarded 'actual bias' or challenge 'to the favor' as including not only prejudice in the subjective sense but also such as might be thought to implicitly arise 'in view of the nature of circumstances of his employment, or of the relation of the particular governmental activity to matters involved in the prosecution, or otherwise'".

The rejection of the lower Court of the appellant's application for a hearing on the question of "actual bias" is in direct contravention of the safeguard established in *Dennis* when it stated:

> "The way is open in every case to raise a contention of bias from the realm of fancy to the realm of fact."

It is submitted therefore that the appellant was denied his legal opportunity to so establish his contention and the ruling of the lower Court constitutes reversible errors.

The Court of Appeals upheld the District Court's denial of the request for the hearing, although no majority could be found to support any one basis for this refusal as demonstrated by the *Quinn* and *Emspak* cases also before this Court. By courtesy of counsel, petitioner respectfully adopts and incorporates such other points and arguments on this point set forth in the brief of *Quinn* v. *U. S.*, No. 8 and *Emspak* v. *U. S.* No. 9.

Point III

The lower Court erred in affirming the trial Court's finding of guilt on counts 3, 4, 5, 6 and 8 when the record fails to establish the appellant's guilt beyond a reasonable doubt.

It is an elementary principle of law that in order to sustain a conviction of guilt of any criminal offense, the government must establish each and every element of the offense, and said guilt must be proved beyond a reasonable doubt. This hearing was completely dominated by clashes between the petitioner and the Committee on the one hand, and petitioner's counsel and the Committee on the other. It is contended that the record (R. 8-26) affirmatively establishes that the petitioner did in fact answer the questions propounded to him by the inquiring authority and was not apprised that said authority was not in fact satisfied with

his responses. Moreover, if the Committee was not satisfied with his answer, it nevertheless abandoned his desire to press for further answer upon objection by the witness or his counsel. It is submitted that the lower Court erred in affirming the trial Court's finding that the petitioner's guilt was established beyond a reasonable doubt. Moreover, the lower Court erred in not reversing and remanding the case to the trial Court on the issue of whether every element of the offense had been established beyond a reasonable doubt. This matter is more fully developed in Point IV.

Argument

Point IV

The trial Court should have entered a judgment a judgment of acquittal since as the record shows the petitioner was never specifically directed to answer.

Although the lower Court rejected the petitioner's contention that he must be specifically directed to answer before he could be held in violation of Title 2 Section 192, U. S. C., the Court apparently ruled that the witness must be apprised in some fashion that his grounds for not answering were rejected and that he was afforded another opportunity to answer. Yet the Court of Appeals, having so held erroneously, failed to reverse and remand the case so that upon the entire record, the trial Court could intelligently apply this principle of law to the facts. While the trial Court found (R. 104) that "the defendant clearly comprehended that he was refusing to answer those questions", (the trial Court here was referring to the first six counts of the indictment) nothing affirmatively appears to establish the Court's application of this principle. In fact the record demonstrates an abundance of confusion created by long colloquies between the petitioner's counsel and the Committee on the other showing that the petitioner was

not made aware of the fact that the grounds of his objections were overruled and that he was afforded another opportunity to answer. This situation was fully understood by Judge Bazelon and he commented upon it in his dissenting opinion (R. 204). It is best illustrated by the following example from the R. 12.

> Mr. Walter: I understand. What did you change your name from?
>
> Mr. Bart: I have already stated my reply to this question.
>
> Mr. Harrison: I understand you refuse to answer this question?
>
> Mr. Bart: My answer is that I have what my name is here, which is the only question pertaining to this inquiry it seems to me.
>
> Mr. Walter: Of course this is all a matter of public record?
>
> Mr. Bart: Correct.
>
> Mr. Walter: Then I suppose that you know that under the law a question innocent on its face can't be arbitrarily ignored. You can't refuse to answer such a question without running the risk of the consequences.
>
> Mr. Unger (Witness' Counsel): I think Mr. Chairman, Mr. Bart has indicated very plainly he has not been contumacious in any regard. He states his name has been Philip Bart for a large number of years.
>
> Mr. Walter: Don't argue with the Committee. You advise your client as you see fit.
>
> Mr. Case: Mr. Chairman, it seems to me that the witness should be advised of the possibilities of contempt when he fails to answer a question as simple and as proper as your question as to what his name was before it was changed.
>
> Mr. Walter: No, he has counsel. Counsel knows what the law is. Proceed Mr. Tavenner.
>
> Mr. Tavenner: Mr. Bart, I understood you to say that you had changed your name legally about 15 years ago?
>
> Mr. Bart: I don't recollect. Maybe a few years less.

In light of this record, which is illustrative of the colloquies as previously referred to, there is serious question of fact as to whether the element of intentional refusal to answer required by the Court of Appeals has been sustained. Certainly the trial Court did not so understand the matter, and the Court of Appeals, while purportedly applying this concept and reversing count 7, it completely ignores the impact of this principle upon the other counts in the conviction which it affirmed.

In light of the interpretation of the statute by the Court of Appeals in the first instance, it appears clear, that the case should have been reversed and remanded in order that the trier of fact apply this principle of law.

Point V

The First Amendment protects a witness before a Congressional Committee against disclosure of the identity of newspaper officials and employees with whom he is associated and his political views and affiliations.

The fact that the petitioner was the general manager of Freedom Press Co., Inc., was unquestionably known to the Committee (R. 35). In fact the record discloses an answer by Mr. Donald T. Appell, a government witness and a Committee official as follows:

Mr. Murray: Will you state what basis, if it is in addition to what you have said, not otherwise? If you are satisfied with your answer that will be all right.

A. Mr Bart was general manager of the Daily Worker, which is a publication printed by the Communist Party, and the Daily Worker—the contents of the Daily Worker have been a subject of many hearings before the Committee. *The fact that he was general manager of the Daily Worker*

would be in itself sufficient reason to subpoena Mr. Bart as a witness before the Committee. (Italics supplied).

While it is conceded that the legislative branch of the Federal Government may conduct Congressional hearing for appropriate purpose within the proper confines as have been judicially determined, it is submitted that the Congress is specifically delimited in its exercise by the First Amendment, and it appears that the Court below erred in not finding on this record that the rights of the petitioner protected by the First Amendment were specifically invaded.

Point VI

The First Amendment protects a witness before a Congressional Committeee against compulsory disclosure of the identity of his political associates, political views and affiliations

This point is identical with that raised by the *Quinn* and *Emspak* cases and by courtesy of counsel the points and arguments set forth in the petition for writ of certiorari in *Emspak* v. *U. S.* filed in this Court are adopted and incorporated by reference.

Point VII

House Resolution 5 as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment

This point is identical to that raised by *Quinn* v. *U. S.*, No. 8 now before this Court. By courtesy of counsel, the points and arguments set forth in that brief are adopted and incorporated by reference in so far as they are pertinent and relevant here.

Conclusion

For foregoing reasons the judgment of conviction must be reversed and the indictment dismissed, or in the alternative the judgment of conviction reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Service

I hereby certify that I caused to be mailed, postage prepaid, a copy of the foregoing brief in the above-named cause, to the office of the Solicitor General of the United States, Washington, D. C., on the 2nd day of September, 1954, in compliance with Rule 33 of this Court.

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